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No. 88-1298

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF MICHIGAN,
Petitioner,

v.

ELBERT BOYD,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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COUNTER QUESTION PRESENTED

WHEN A STATE APPELLATE DECISION RESTS ON AN ADEQUATE FOUNDATION OF STATE SUBSTANTIVE LAW DOES THE PRINCIPLE OF FEDERALISM RENDER THE STATE DECISION IMMUNE FROM REVIEW ON CERTIORARI?

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Elbert Boyd, respondent, by his attorney, Carl Ziemba, makes the following Response to Petition for a Writ of Certiorari and prays this Court deny same.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals which is the center of controversy here and the Order of the Michigan Supreme Court denying leave to appeal to the State of Michigan have been printed in Petitioner's Appendix to Petition for a Writ of Certiorari and perhaps need not be set forth here.

STATEMENT OF JURISDICTION

Petitioner claims that the jurisdiction of this Court is invoked under *28 USC 1257(3)* which reads as follows:

> 'By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to

> the Constitution, treaties of laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.'

Petitioner claims that the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were implicated in the judgment of the Michigan Court of Appeals because a 'right, privilege or immunity is specially set up or claimed under the Constitution'.

Respondent challenges the claim of the Petitioner that the United States Constitution is implicated in the judgment of the Michigan Court of Appeals and asserts, rather, that the judgment of the Michigan Court of Appeals rests on an adequate foundation of state substantive law and that it is immune from review on certiorari upon principles of federalism.

CONSTITUTIONAL PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

After respondent was convicted of murder of the first degree in a bench trial, he was granted a new trial on grounds which are not in issue here. In preparation for his second trial, respondent filed a pre-trial motion seeking the suppression of the anticipated in-court identification of respondent by one Clinton Woods on the bases that a highly suggestive confrontation between Woods and respondent had a tendency to lead to an irreparable mistaken identification and that

Woods did not have a source of identification independent of the suggestive confrontation.

After conducting an evidentiary hearing on respondent's said motion, the trial court granted the motion and ordered the suppression of the anticipated in-court identification of respondent by Woods.

The testimony adduced on the evidentiary hearing reflected a conflict between the officer in charge of the case and Woods as to the occasion upon which the confrontation in question occurred: the officer testified that it occurred at preliminary examination and Woods testified that it occurred during a juvenile court hearing which preceded the preliminary examination. However, the officer and Woods agreed in their individual testimony that a confrontation in a court room during a judicial proceeding in the prosecution of respondent had occurred between Woods and respondent, and their individual testimony agreed generally on the circumstances of the confrontation:

The officer had invited or instructed Woods to come to court on the occasion in question; whether Woods had been subpoenaed was not clear. Woods was driven to the court house by the parents of the deceased victim. Woods was not sequestered by the police or the prosecutor upon his arrival at the court house; he was allowed to roam freely in the hallway outside the court room in which proceedings against respondent were being conducted. Other witnesses told Woods that respondent 'is him', and Woods 'went back down out of curiosity to see who they was pointing to'. The officer wasn't sure that Woods would be called to testify because the prosecution 'had one good, strong witness' and Woods 'was a so-so witness' and the officer 'was not sure just what Clinton Woods would be able to tell me nor how he would testify'. Woods testified that he

had never seen respondent prior to the moment of the shooting which resulted in the death of the deceased, and the Michigan Court of Appeals found that according to Woods' testimony on the first trial, 'Woods testified that he looked at the shooter the first time for "no more than a quick second" and the second time for "no more than a quick second"' [Petition for Certiorari, 28a-29a].

The Michigan Court of Appeals granted the State of Michigan leave to file an interlocutory appeal from the order of the trial court granting respondent's motion to suppress the anticipated in-court identification of respondent by Woods. In his brief to the Michigan Court of Appeals, respondent claimed that his right to counsel had been violated under the Sixth Amendment to the United States Constitution *and* under Section 20, Article 1, Michigan Constitution 1963; and respondent claimed that his right to due process was violated under the Fourteenth Amendment to the United States Constitution *and* under Section 17, Article 1, Michigan Constitution 1963. Basically, respondent argued to the Michigan Court of Appeals that the State of Michigan was responsible for the occurrence of the highly suggestive confrontation between respondent and Woods and that Woods did not have a basis or source for his identification of respondent independent of the suggestive confrontation.

REASONS FOR DENYING THE WRIT

Simply put, this Court has no jurisdictional basis for reviewing the judgment of the Michigan Court of Appeals.

Nowhere in its opinion does the Michigan Court of Appeals even mention any provision of the United

States Constitution; nor does the Michigan Court of Appeals indicate or intimate that it was predicating its opinion and judgment on any provision of the United States Constitution; nor does the Michigan Court of Appeals cite any federal case or opinion of this Court as authority in its opinion.

The basis for the opinion and judgment of the Michigan Court of Appeals was that the totality of the circumstances indicated that the anticipated in-court identification of respondent by Woods was not reliable. In its opinion, the Michigan Court of Appeals said:

> 'The fairness of an identification procedure is evaluated in light of the totality of the circumstances. [citation of two Michigan appellate cases]. The test is whether the totality of the circumstances shows it to be reliable. *Id.* The burden is on the prosecution to prove by fair and convincing evidence that the in-court identification has a sufficient independent basis to purge the taint caused by a prior improper confrontation. [citation of two Michigan appellate cases]. In *Kachar* [*People* v *Kachar*, 400 Mich 78, 97 (1977)], the Supreme Court set forth the factors to be used to determine whether an independent basis exists. . . .' [Petition for Certiorari, 27a]

In *Kachar, supra*, the Michigan Supreme Court stated in connection with the problem of in-court identification as follows:

> 'The problem becomes, then, what factors may have a bearing upon the true basis of the witness's in-court identification to prove that the courtroom identification is not the fruit of the suspect pre-trial identication. *We have not*

> *before today set forth the principles on which such decisions should be based.*
>
> * * *
>
> 'The *Wade* [*United States* v *Wade*, 388 US 218 (1967) criteria, however, are suggestions only, neither exclusive nor inclusive, *and we are not limited by them in designating relevant factors to be considered by our own courts.*' 400 Mich 78, 93-94 (1977) [emphases added; footnote omitted].

Thus, it is clear that the Michigan Supreme Court in *People* v *Kachar, supra,* was setting criteria for Michigan courts to follow as substantive Michigan law while looking to the opinions of this Court and other federal courts for guidance. Nowhere in *Kachar* did the Michigan Supreme Court invoke the federal constitution as basis for its decision.

Thus, in its opinion in the case at bench, the Michigan Court of Appeals, by citing *People* v *Kachar, supra,* was invoking Michigan substantive law.

In its opinion in the case at bench, the Michigan Court of Appeals *without any citation of authority and certainly without any reference to the federal constitution* approved the finding of the trial court 'that the witness Woods' in-court identification was tainted by a prior inadvertent but improper identification made by Woods at an earlier court proceeding' [Petition for Certiorari, 26a].

Whatever one might think about the methods employed by the Michigan Court of Appeals in reaching its approval of the finding of the trial court that the in-court identification of respondent by Woods was tainted by an improper confrontation, the fact remains that the Michigan Court of Appeals did not find that respond-

ent's rights under the federal constitution were violated nor did the Michigan Court of Appeals predicate its holding on the proposition that any of respondent's rights under the federal constitution had been violated.

Thus, there is no jurisdictional basis for review by this Court of the judgment of the Michigan Court of Appeals in the case at bench. In *Wainwright* v *Sykes*, 433 US 72, 81 (1977) this Court stated that 'it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts', and the Court cited *Fox Film Corp* v *Muller*, 296 US 207 (1935) and *Murdock* v *Memphis*, 20 Wall 590, 22 L Ed 429 (1875).

In *Fox Film Corporation* v *Muller, supra*, this Court said:

> '[T]he settled rule [is] that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' *Id*, at 210.

In the case at bench, the principle of *Fox* applies more forcibly because there is not extant in the opinion of the Michigan Court of Appeals any federal grounds for the opinion; the opinion of the Michigan Court of Appeals is grounded solely on Michigan substantive law.

CONCLUSION

Respondent respectfully prays this Court deny the Petition for Certiorari filed in this case.

Respectfully submitted,

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Dated: April 13, 1989